

1 **UNITED STATES DISTRICT COURT**  
2 **FOR THE DISTRICT OF ARIZONA**  
3

4 ARIZONA ATTORNEYS FOR )  
5 CRIMINAL JUSTICE; CHRISTOPHER ) Case No. 2:17-cv-01422-SPL  
6 DUPONT; RICH ROBERTSON; )  
7 RICHARD L. LOUGEE; RICHARD D. )  
8 RANDALL; JEFFREY A. KIRCHLER; )  
and JOHN CANBY, )

9 Plaintiffs, )  
10 )

11 v. )  
12 )

12 DOUG DUCEY, in his official capacity as )  
13 Governor of the State of Arizona; MARK )  
14 BRNOVICH, in his official capacity as )  
Attorney General of the State of Arizona, )

15 )  
16 Defendants. )  
17 )

18 **AMICUS CURIAE BRIEF OF**  
19 **THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**  
20 **IN SUPPORT OF DEFENDANTS DOUG DUCEY AND MARK BRNOVICH**

21 SHEILA POLK  
22 Yavapai County Attorney  
23 Chair, Arizona Prosecuting Attorneys'  
24 Advisory Council  
25 1951 West Camelback Road, Suite 202  
26 Phoenix, Arizona 85015-3407  
27 (602) 542-7222 / FAX (602) 274-4215  
28 Diana.Cooney@apaac.az.gov  
Attorney for Amicus Curiae

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1       **I.       IDENTITY AND INTEREST OF *AMICUS CURIAE*.**

2           The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") respectfully  
3 submits this *amicus curiae* brief on behalf of its members, in support of Defendant  
4 Office of the Attorney General of the State of Arizona.

5           APAAC is created by A.R.S. § 41-1830 *et seq*, and is comprised of the elected  
6 county attorneys from Arizona's fifteen counties, in addition to the Arizona Attorney  
7 General, and several head city court prosecutors. APAAC's primary mission is to  
8 provide training, resources, and a variety of other services to the more than 800 state,  
9 county, and municipal prosecutors in Arizona. APAAC also serves as the liaison for  
10 prosecutors with the legislature and the courts, advocating for prosecutorial interests  
11 before the legislature or proposing changes to the Arizona Supreme Court's procedural  
12 rules.

13           On occasion, APAAC submits *amicus curiae* briefs in Federal Court on issues  
14 of significant concern. This is one of those occasions. APAAC has been granted  
15 permission by both the Plaintiffs and the Defendant to file this *amicus* brief.

16           In its role as a prosecutorial educator, advocate, and resource, APAAC has a  
17 significant interest in the issue involved in this case. The proposed change to allow  
18 defense counsel and its agents to initiate contact with a victim would cause re-  
19 victimization, impinge upon a victim's rights and cause a disruption of the criminal  
20 justice system. Each of these consequences of the proposed change is significant – and  
21 together the consequences constitute a serious matter of public concern.

22           For all these reasons, APAAC joins with Defendant Office of the Attorney  
23 General of the State of Arizona in asking this Court to dismiss Plaintiff's complaint.

1 **II. ARGUMENT**

2 **A. Allowing the Defense Bar or its Agents to Initiate Contact With a Victim**  
3 **Would Cause Re-victimization, Impinge on a Victim's Rights and Cause**  
4 **a Disruption of the Criminal Justice System.**

5 The Arizona Constitution guarantees crime victims to be "free from  
6 intimidation, harassment, or abuse, throughout the criminal justice process." Ariz.  
7 Const. Art II, Sec. 2.1(A)(1). The Constitution does not state any exception. The  
8 Constitution does not include any limiting language. The Constitution guarantees  
9 freedom from intimidation.

10 The Arizona Constitution recognizes the cost already paid by crime victims long  
11 before they are ever requested to submit to a defense interview. The State of Arizona  
12 has recognized that there are important public policy reasons to provide certain  
13 protections to crime victims – so important that Arizona amended her Constitution.  
14 The Arizona State Legislature also recognized public policy reasons to provide certain  
15 protections to crime victims. To this effect, the Legislature enacted A.R.S. § 13-4433,  
16 which affords the victim the right to refuse an interview. "Unless the victim consents,  
17 the victim shall not be compelled to submit to an interview on any matter, including  
18 any charged criminal offense witnessed by the victim and that occurred on the same  
19 occasion as the offense against the victim, or filed in the same indictment or  
20 information or consolidated for trial, that is conducted by the defendant, the  
21 defendant's attorney or an agent of the defendant." A.R.S. § 13-4433(A). Furthermore,  
22 "The defendant, the defendant's attorney or an agent of the defendant shall only initiate  
23 contact with the victim through the prosecutor's office. The prosecutor's office shall  
24 promptly inform the victim of the defendant's request for an interview and shall advise  
25 the victim of the victim's right to refuse the interview." A.R.S. § 13-4433(B).

26 As is set forth in the Defendant's Opposition to Preliminary Injunction, the law  
27 does not violate defense counsel's right to free speech. The Plaintiffs are not only  
28 challenging a valid law, they are seeking to change a system this is working well.

1       What would be the impact on a victim if the law is changed? If direct contact is  
2 granted to defense counsel, how would that work? Here is a possible scenario:  
3 Defense counsel gains access to the victim's contact information. Defense counsel  
4 contacts the crime victim to ask if they will submit to an interview. The crime victim,  
5 unaware that they have the right to refuse an interview, submits to one. Through this  
6 interview, defense counsel is able to obtain personal information from the victim.  
7 Defense counsel contacts the crime victim a second and third time claiming they need  
8 to interview them again and again based upon information they gleamed during their  
9 investigation of the case.

10       Such a scenario would create the very situation that the Arizona Constitution and  
11 the statute was designed to prevent, thus re-victimizing the victim. Also, if such direct  
12 contact is "necessary," how will a victim's fear or privacy rights be quantified?<sup>1</sup> Will  
13 the victim be chided into giving defense counsel identifying or private information?  
14 Will they unknowingly provide defense counsel medical records, financial records and  
15 the like? Will victims be asked to waive counseling privileges so counselors can verify  
16 that a victim has sought counseling? The mere fact that defense counsel would be  
17 allowed to directly contact a victim regarding an interview could indeed open a  
18 Pandora's box violating the very privacy rights of victims that the Arizona State  
19 Legislature went to great lengths to protect.

20       Protecting constitutional rights can be cumbersome. Protecting constitutional  
21 rights can also be inefficient. However, because there are more important principles at  
22 stake, constitutional rights are protected even if cumbersome and inefficient. These  
23 victims' rights must be protected so long as such protection does not violate a federal  
24 right of the accused. Here, it does not. Allowing defense attorneys to directly contact

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26 <sup>1</sup> See also, A.R.S. § 13-4434. Victim's right to privacy: "The victim has the right at  
27 any court proceeding not to testify regarding any identifying or locating information  
28 unless the victim consents or the court orders disclosure on finding that a compelling  
need for the information exists."

1 crime victims to inquire into whether they will submit to an interview would be a failure  
2 to protect the rights of victims to be free from intimidation as well as being treated with  
3 dignity and respect. While Plaintiff's argue the fact that they must request a victim  
4 interview via a prosecution office is an infringement on their free speech rights, this  
5 accommodation for victims attempts to limit the re-victimization of the most  
6 vulnerable. It also protects the truth-seeking function of the criminal justice system  
7 without violating any right of the defendant.

8 The Arizona Constitution already provides an evidentiary threshold. The  
9 Constitution provides rights only to those individuals who now belong to an unenviable  
10 club – crime victim. Only witnesses who meet the definition of crime victim are  
11 afforded the ability to have a layer of protection between them and a defense attorney  
12 when it comes to being subject to an interview.

13 As such, our Constitution has cloaked crime victims with individual rights. Each  
14 victim is an individual. While each victim has certain rights under the Arizona  
15 Constitution, each victim, individually, will choose whether to exercise these rights.  
16 Some victims may agree to be interviewed by the defendant, some may not. Some  
17 victims may directly make contact with a defense attorney while others may be so  
18 fearful that a mere trip to a courthouse parking lot triggers paralyzing fear.

19 The criminal justice system surrounding a victim's right to refuse a defense  
20 interview includes numerous accommodations to ensure that pretrial, trial and possibly  
21 post-trial proceedings are not disrupted. Prosecution agencies statewide have policies  
22 and procedures in place to ensure that contact of a victim by a defense attorney or one  
23 of its agents is initiated solely through that prosecuting agency. Such accommodations  
24 are in place to provide crime victims protection of their rights. These prosecuting  
25 agencies also go to great lengths to inform crime victims, either through a victim  
26 advocate or a prosecutor, if a defense attorney wishes to interview a victim.  
27 Prosecuting agencies recognize the right to refuse a defense interview rests entirely  
28 with the individual victim. Should a victim choose to submit to a defense interview,

1 the prosecuting agency makes sure that the crime victim remains free from harassment,  
2 intimidation, or abuse during that interview.

3 The accommodations for crime victims by prosecution agencies regarding the  
4 right to refuse a defense interview have generally been accepted for decades. It would  
5 be a systemic disaster to change horses mid-stream on this rule and allow defense  
6 attorneys to directly contact a crime victim. How would the victim be informed of their  
7 right to refuse an interview? Would the prosecution agency still inform the crime  
8 victim? Or would the burden to inform be passed on to the already over taxed court  
9 system? At what point in the process could defense counsel or their agents begin  
10 initiating victim contact? Would they be allowed to contact a victim pre-Indictment?  
11 Before making direct contact with a victim, would the victim be forced to sign a waiver  
12 of their right? Would defense counsel be required to inform a crime victim about their  
13 right to refuse an interview similar to a defendant's *Miranda* rights? How many more  
14 crime victims would now need to hire private representation to be the replacement filter  
15 in order to maintain their rights to be free from harassment, intimidation or abuse?

16 Once the ability of defense attorneys or their agents to directly contact victims  
17 comes into play, victims may become less inclined to report a crime and/or cooperate  
18 with the criminal justice system. Presently, victims are afforded the right to be free  
19 from intimidation and harassment and they have a stop gap between themselves and  
20 defense counsel - the prosecution agency. Prosecution agencies statewide make  
21 victims aware they do not have to submit to a defense interview. Should defense  
22 counsel request a victim interview, the prosecutor or victim advocate informs the  
23 victim of the request. If the stop gap between a crime victim and defense attorney is  
24 removed, at what point can defense counsel or one of their agents begin victim contact?  
25 If onslaughts of direct requests are made on crime victims early on in the proceeding,  
26 victims could retreat into themselves for fear of intimidation by the defense attorney.  
27 This would lead to victims not cooperating with any of the parties for fear of re-  
28 victimization and harassment because they happen to be a victim. The criminal justice



1 system does not operate in a vacuum. Once the word gets out that when you are the  
2 victim of a reported crime you risk being constantly harangued by the perpetrators'  
3 attorney, individuals will become less inclined to report criminal activity. This will not  
4 only negatively impact the criminal justice system, but also society as a whole.

5 All of above are valid questions and consequences to when a prosecution agency  
6 is removed as a filter between a defense attorney and a crime victim. Furthermore, the  
7 proposition that a defense attorney or one of its agents be allowed to directly contact a  
8 crime victim brings victims' rights full circle, disrupting the entire criminal justice  
9 system and placing the rights of a crime victim back into pre-1992 before the Victim's  
10 Bill of Rights existed.

11 Plaintiffs are clearly using the cloak of their First Amendment right to free  
12 speech as a dagger to slowly begin to cut away and erode a crime victim's rights. For  
13 two decades, crime victims have constitutionally and statutorily been afforded the  
14 rights to be free from intimidation, harassment and abuse. For two decades prosecution  
15 agencies statewide have operated as a filter between crime victims and defense  
16 attorneys to ensure the crime victim's rights and uphold their privacy rights. To allow  
17 a defense attorney or one of their agents to directly contact crime victims would have  
18 a chilling effect on victims willing participation in the criminal justice system and  
19 would subject them to the possibility of re-victimization while simultaneously causing  
20 systematic disruption.

1 **III. CONCLUSION**

2 APAAC respectfully urges this Court to dismiss Plaintiffs' complaint. Allowing  
3 defense attorneys or their agents to directly contact a crime victim is contrary to law,  
4 and contrary to the separation of constitutional principles that are the very bedrock of  
5 crime victim's rights in the criminal justice system.

6 RESPECTFULLY SUBMITTED this 3rd day of July, 2017.

7  
8 By: /s/ Sheila Polk

9 SHEILA POLK

10 Yavapai County Attorney

11 Chair, Arizona Prosecuting Attorneys'

12 Advisory Council

13 Attorney for *Amicus Curiae*  
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DATED this 3<sup>rd</sup> day of July, 2017

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